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No. 5

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

E. I. DU PONT DE NEMOURS AND COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

REPLY BRIEF FOR THE UNITED STATES

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I. THE RELATIONSHIP BETWEEN THE DISTRICT COURT'S OPINION AND DU PONT'S DISTRICT COURT BRIEF

Du Pont's brief makes some 30 references to the district court's opinion, and, on factual aspects of the case, quotes extensively from the opinion (D. Br. 20-21, 42, 47, 98-100, 101). In view of du Pont's reliance on this opinion, we state more explicitly than in our opening brief (see pp. 75, 103, 116) the extent to which the opinion is drawn from du Pont's district court brief.

Apart from the first eight pages (R. 53-60), the opinion is simply a *haec verba* restatement, with

some excissions, of du Pont's district court brief. The opinion follows the exact structure of that brief, including headings and sub-headings; it adopts every contention, factual or legal, made in that brief; and it takes from that brief, sometimes *verbatim* but otherwise after editorial changes not going to substance, every sentence (except two) of an opinion which, as to the part with which we are concerned, covers 57 pages of the printed record (R. 61-63, 285-339).[1]

The sentence-by-sentence derivation from du Pont's brief is illustrated in the appendix to this brief showing such derivation as to all parts of the opinion quoted in du Pont's brief in this Court.

2. THE GOVERNMENT'S RELIANCE ON DU PONT REPORTS TO SHOW DU PONT'S OWN VIEW ON CELLOPHANE'S SIGNIFICANT COMPETITION

The Government does not contend that there is no competition between cellophane and other packaging materials. Its contention is that this competition was not such as to prevent du Pont from exercising monopoly power of a kind condemned by Section 2 of the Sherman Act. The Government relied, *inter alia*, upon du Pont's appraisal of this competition (G. Br. 83-87). It did so upon the assumption that those in charge of du Pont's cellophane business knew better than anyone else the competition encountered by the company which was of practical significance. To show such appraisal,

[1] Our examination has disclosed only two sentences (the two in the paragraph immediately preceding the heading at the bottom of R. 310) not taken from du Pont's brief.

the Government cited and discussed (1) the "Competitive Reports" which those in charge of du Pont's cellophane business submitted year after year to its Executive Committee and (2) certain intra-company du Pont reports.

(1) The Government stated that the "Competitive Reports," of which there are 23 in the record, dealt almost exclusively with the competition of other cellophane, and that in the entire series only two made even casual reference to competition of packaging materials made from paper, *i.e.*, glassine, waxed paper, and sulphite paper (G. Br. 84).[2] Du Pont's brief does not deny the accuracy of these specific statements, but it asserts that the reports are replete with "direct and indirect references to the market pressures and inter-product competition * * * including inferential references such as discussion of the importance of developing a moistureproof film" (D. Br., n. 52, at p. 150).

As to "market pressures," we submit that unless the prohibitions of Section 2 of the Sherman Act are given an interpretation which would emasculate them, a concept so vague and inclusive is not a test of possession of monopoly power over trade in a particular product. As to "inter-product competition," we have already pointed out that the reports are, for all practical purposes, completely silent on competition by waxed paper or glassine. And insofar as the reports referred to competition of other films, this competition was on too small a

[2] On further check, we have found a third casual reference to such competition (GX-440, R. 3747).

scale to be significant. Not only was the quantity produced "relatively small" (fng. 688, R. 250), but in the court below du Pont's counsel conceded that films other than cellophane represented only 2% of the materials embraced within the "flexible packaging materials market" as defined in du Pont's exhibits (R. 1899). Furthermore, the "ANNUAL MARKET ANALYSIS REPORT OF [DU PONT'S] CELLOPHANE DIVISION FOR 1948" states (DX-593, R. 5185):

> The principal markets for non-viscose films have been competitive with Cellophane only to a very minor degree up to this time. Some are used very little or not at all in the packaging field—others are employed principally for specialty uses where Cellophane is not well adapted—none have been successfully introduced into any of Cellophane's main markets, due to their inherent shortcomings. In all cases, these films are sold at higher prices.

(2) Of the three intra-company reports on which the Government relied in the present connection, the two most important are a 1939 report and a 1950 report. The former was submitted to du Pont's Executive Committee by the General Manager of its Rayon Department in order to supply information on which to base a major policy decision, whether du Pont should construct a new cellophane plant (G. Br. 84-85). The latter is an elaborate report which, among other things, sur-

veys cellophane's present and prospective competitive position (G. Br. 85-86).[3]

Du Pont characterizes the Government's reliance on the "Competitive Reports" and intra-company reports as use of "a few selected documents," "selected Government exhibits," "selected du Pont reports," and "selected evidentiary material" (D. Br. 92; n. 23 (p. 93), n. 52 (p. 149), 150). They are "selected", to be sure, but only in the sense that the Government deemed this evidence peculiarly authoritative. We deny that they are "selected" in the sense that, among du Pont reports of the same plane, those expressing one view were cited and those expressing a contrary view were ignored.

We also submit that du Pont's brief fails to show any such "selected" use. It is true that in June 1948 when du Pont made an announcement of an increase in cellophane prices it sent to its salesmen, with the announcement, a bulletin which refers to waxed paper, glassine, and boxboard as cellophane's "principal competitive products" (see D. Br. 102-103). This bulletin was sent out *after* du Pont had filed its answer in this case, alleging that cellophane has at all times been in direct competition with other packaging materials, "particu-

[3] The Manager of du Pont's Cellophane Division stated that the report "bears the approval of the Division Management," and that he hoped that it would furnish the information desired by du Pont's Executive Committee (GX-586, R. 4059-60). The district court and du Pont's trial counsel evidently considered the report authoritative because most of finding 695 (R. 252-3) and most of proposed finding 695 are based exclusively on this report.

larly glassine, wax papers, greaseproof papers, cartons, foils, and more recently, new types of transparent films" (R. 16, 20). Furthermore, du Pont put in evidence 17 prior announcements of cellophane price changes (16 price reductions and one price increase).[4] If any bulletin to salesmen similar to that in June 1948 accompanied any such earlier announcement, du Pont's counsel certainly fell short of their customary diligence in failing to introduce it into evidence. Du Pont's reliance on the 1948 bulletin might therefore appear to be a use of "selected" evidentiary material.

Du Pont has stated that "many contemporary reports by salesmen" support the court's findings on competition, findings which differ sharply from the viewpoint of du Pont's management as set forth in the du Pont documents cited by the Government (D. Br., n. 23, p. 93). Du Pont has not identified these reports or specified what they state. In any event, they represent part of the raw material available to the higher echelons of du Pont's management when called upon to evaluate the competition which is sufficiently direct and potent to require serious consideration in making day-to-day business decisions or policy determinations relating to conduct of du Pont's cellophane business (Cf. fng. 823, R. 280).

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[4] DX-338, R. 4786; DX-340, R. 4795; DX-341, R. 4796; DX-344, R. 4800; DX-345, R. 4801; DX-346, R. 4802; DX-348, R. 4804; DX-349, R. 4805; DX-350, R. 4806; DX-351, R. 4807; DX-353, R. 4809; DX-354, R. 4810; DX-357, R. 4813; DX-360, R. 4816; DX-363, R. 4820; DX-364, R. 4821; DX-373, R. 4838.

3. THE APPENDIX TO DU PONT'S BRIEF, UNDERTAKING TO SHOW CONTRADICTION BETWEEN STATEMENTS IN THE GOVERNMENT'S BRIEF AND FINDINGS OF THE DISTRICT COURT

The Government stated in its brief (pp. 9, 140) that it was not challenging any finding of "specific fact" made by the district court. The purpose was to eliminate from the appeal review of purely evidentiary issues. Du Pont, in alleging contradiction between "assertions" in the Government's brief and findings of the court (D. Br. 1a-45a), bases the claim on what it characterizes as "specific findings of fact," which is very different from findings of specific fact (D. Br. 1a), and it cites several of the findings which the court labeled "Conclusions of the Master Facts" (R. 282).[5] The nature of these findings is illustrated by finding 840 (R. 283), which reads:

> The record establishes du Pont has not achieved market control or monopoly power as to trade and commerce in cellophane nor attempted to achieve or to exert such power.

Whether or not such a finding is specific, to the extent that it is a finding of "fact" rather than a conclusion of law, it is completely impregnated with questions of statutory construction.

Du Pont also cites as "findings" contradictory of the Government's "assertions" various statements made in the district court's opinion,[6] notwithstanding the fact that the court made 854 for-

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[5] Findings 838 (D.Br. 9a-13a), 840 (D.Br. 21a), 843 (D. Br. 29a), 843 (D. Br. 33a).

[6] See D.Br. 19a, 23a, 27a, 31a, 35a, 41a, 43a.

mal findings of fact, more than 750 of which relate to the charge that du Pont has been monopolizing trade and commerce in cellophane.

Aside from the nature of the findings relied upon to establish contradiction, we submit that if the cited Government "assertions" are carefully compared with the cited "findings," very little actual contradiction is shown. We also submit that such contradiction as there may be represents, in part, contradiction between the court's own findings; in part, semantics (*i.e.*, use of such words as "competition" and "compete" in differing senses); and, in part, inconsistency with conclusory findings based on the court's construction of the statute, which the Government is challenging.

We do not attempt to analyze and discuss all of the many contradictions alleged by du Pont, and confine ourselves to those which are referred to in three of the headings under which they are grouped.

(a) *"As to Du Pont's Profits" (D.-Br. 40a-41a).*

We submit that this is an example of alleged conflict where there is no conflict. The cited statements in the Government's brief are that du Pont's rate of profit has been "very high" and its profits "temptingly high." The first cited finding is that du Pont's "net return" on cellophane during the 1937-1949 period has varied between a high of 28.7% and a low of 8.4%. Profits would appear to be very high and temptingly high when they provide such "net return," which represents profit after Federal income taxes and other charges not

directly involving the cellophane business. Moreover, from the standpoint of profits sufficiently high and tempting to induce others to enter the industry, "net return," which is distorted for certain years by the impact of Federal excess profits taxes (see G. Br. 18), is a less accurate measure of temptingly high profits than the data on which the Government's statements are based—the enormous appreciation in the value of the stock of the cellophane subsidiary in its early years and du Pont's "operative" return from its cellophane business in the later years (G. Br. 16-18).

The other cited findings are that du Pont was not able to determine "in advance" what its profit rate would be, and that there was "[n]o proof" that du Pont's rate of return was higher than Sylvania's or that it was more or less than that of other producers of flexible packaging materials. Citation of these findings implies that, absent the factors to which they refer, no amount of evidence could establish that du Pont's profits were temptingly high.

(b) *"As to the Proportion of Cellophane Produced by Du Pont" (D.Br. 42a-43a).*

Here there not only is no conflict but, if there were one, it would show an internal conflict in the court's findings. The cited Government statement is that after 1935 du Pont and Sylvania's share of total production was "on a remarkably uniform basis—approximately 75% for du Pont and 25% for Sylvania." This accurately restates

one of the court's findings, namely, that "du Pont" produced and sold 75% of the total amount of cellophane manufactured in the United States in the twenty years [1931-1950] and Sylvania about 25%," and that "[in] the individual years this ratio rarely varied more than 1% or 2%" (fng. 308, R. 157).

Du Pont cites the finding that du Pont's cellophane production "is declining", but, as the rest of the finding shows, this is based on du Pont's share of total domestic "productive capacity" in *May 1952*, and the drop in its share as of that date is solely attributable to the fact that, after the filing of the Government's complaint in 1947, du Pont, "to reduce the hazard of being judged to have a monopoly", invited and permitted Olin to become a manufacturer of cellophane (G.Br. 28).

The other cited findings are that the "rate of growth" of du Pont and Sylvania "varied from year to year" (fng. 308), and that their respective sales increased or decreased "from year to year" at different "rates" (fng. 296). Year to year variance is not "rate of growth". In addition, the finding does not state that the variance was more than minuscule. And comparison of a company's sales in one year with those of the preceding year, and expressing the year-to-year variation in terms of per cent (fng. 296, R. 154), has no validity. Thus, if industry sales were $100,000 and a company had $2,000 sales in one year, $4,000 the next, and $2,000 the third, the change in the second year would be 100% and in the third year 50%, but the

changes would be of no significance where the issue was whether a particular company had had, year after year, approximately 75% of total industry output.

(c) "*As to Du Pont's Awareness of Competition Between Flexible Packaging Materials*" (*D. Br. 2a-3a, 5a*).

This heading involves the elusive concept "competition", the very meaning and significance of which is a critical issue on this appeal. The cited Government statements are that du Pont firmly believed that no other flexible packaging materials was "directly competitive" with cellophane; that du Pont, in making its own plans, forecasts, and business judgments, considered cellophane's "true competition" to be that provided by other cellophane; and that du Pont's own view of the competition which cellophane encounters lays bare the artificial nature of the elaborate structure of findings built upon the court's concept of the "pertinent market".

The first cited finding is that from the beginning du Pont has been "aware of competition" of other packaging materials. Mere awareness of such competition is not in conflict with our statements.

The next cited finding is that du Pont's research was for the purpose of enabling it to "meet competition" of waxed paper and glassine and to lower costs so that prices might be reduced and markets broadened. Another quoted finding is that, in determining its prices, du Pont "considered as a fac-

tor" prices of other packaging materials (fng. 134, R. 107). The remaining findings which are cited are mere variants of these two findings. We submit that findings such as these do not negative our statements, based on evidence previously discussed (*supra*, pp. 2-5), as to the competition of other materials which the du Pont management considered sufficiently direct to be given consideration in making decisions and formulating plans for the conduct of its cellophane business.

Respectfully submitted,

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OCTOBER, 1955.

APPENDIX

Correspondence Between Du Pont's District Court Brief and District Court's Opinion, in Parts of the Opinio Quoted in Du Pont's Brief in This Court [7]

~~The~~ Market evidence ~~thus presented~~ is ~~more~~ complete, ~~more searching and more explicit than any which has ever been presented in a monopoly suit~~. Defendant *has showed* ~~was convinced that only by such~~ a detailed development of ~~the~~ evidence *to* ~~could it~~ bring before *me an* ~~the court a full~~ appreciation of the intense competition existing in the flexible packaging markets, and an understanding of the business considerations which motivated du Pont in the various steps it took to develop cellophane. [8]

Defendant *did* ~~does~~ not rely on economic theory ~~and surmise,~~ but *rested* ~~rests~~ its proof on ~~the~~ testimony of independent businessmen engaged in various aspects of the flexible packing business. [9]

Du Pont *by evidence makes* ~~has sought by its evidence to make~~ speculation superfluous by bringing ~~the actual~~ facts of the marketplace to the surface ~~where they may be perceived~~. [10]

Defendant, ~~in contrast,~~ presented testimony *of* ~~from~~ competing manufacturers, from large and

[7] Words in the brief which the opinion omitted are stricken through and words which it added are italicized. We do not show the court's omission of references made in du Pont's brief to its proposed findings of fact.

[8] R. 289, quoted (D.Br. 20); du Pont's district court brief, pp. 16-17.

[9] R. 289, quoted (D.Br. 20); du Pont's district court brief, p. 15.

[10] R. 289, quoted (D.Br. 21); du Pont's district court brief, p. 18.

small converters, and from ~~the~~ users of packaging materials located in ~~many~~ different parts of the country and engaged in ~~many~~ different lines of business. This ~~direct~~ evidence was supplemented by a market survey, by studies from trade associations, by ~~the trade~~ reports of du Pont's own salesmen, by physical samples of materials and ~~types of~~ wraps, by testimony of company officials concerned with competitive problems, and by reference to extensive documentation in reliable trade journals and authoritative texts ~~all to the same effect.~~[11]

~~The~~ *P*roof deals with continuing intense competition for specific orders, with never-ending interchanging of materials as the normal and characteristic experience.[12]

~~Substantial~~ *S*hifts of business have been proved ~~throughout the entire history of du Pont Cellophane.~~ It has been proved ~~that~~ in every major end use; du Pont cellophane has lost and gained actual paying customers, as a result of cost and quality judgments by these customers. It has been proved ~~that~~ these gains and losses are substantial.[13]

Competitive influences in the flexible packaging markets place ~~severe~~ limitations upon du Pont's pricing policies and procedures. They ~~constantly~~ *force* ~~forced~~ reduction of du Pont's prices and *deny*

[11] R. 289, quoted (D.Br. 21); du Pont's district court brief, p. 16.

[12] R. 290, quoted (D.Br. 42); du Pont's district court brief, p. 19.

[13] R. 292, quoted (D.Br. 42); du Pont's district court brief, p. 25.

~~denied to~~ it ~~any~~ power to raise prices in the manner of a monopolist.[14]

Du Pont could not have developed ~~any appreciable~~ volume of cellophane business without lowering its prices. ~~Mr. Yerkes, for example, specifically testified that " . . . the only thing open to us if we wanted to expand the business was to get the price down." The testimony of Mr. Carpenter was to the same effect, and documentary material received in evidence but stresses their testimony.~~ It was only as du Pont lowered price and ~~thus~~ narrowed ~~the~~ relative spread between cellophane prices and the prices of these other materials that it was accepted for end uses where wax paper and glassine were ~~already~~ established. Only by ~~constant~~ reduction of price has cellophane been able to achieve ~~or maintain~~ an appreciable volume of sales *in competition with other packaging materials.*[15]

~~The~~ *Evidence* ~~taken in this case~~ shows a ~~high~~ degree of price sensitivity in the flexible packaging markets. This is reflected both statistically and in terms of concrete experience with specific accounts. ~~Viewed statistically, the record discloses the close correlation between du Pont's narrowing of the price spread between cellophane and waxed paper and glassine by price reductions and increases in the volume of its business.~~[16]

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[14] R. 302, quoted (D.Br. 47); du Pont's district court brief, p. 49.

[15] R. 300, quoted (D.Br. 98); du Pont's district court brief, pp. 44-45.

[16] R. 301, quoted (D.Br. 98-99); du Pont's district court brief, p. 46.

Du Pont's sales grew ~~most rapidly~~ whenever ~~the~~ spread between prices of cellophane and ~~the~~ other materials narrowed. This relative price relationship *was* ~~is~~ presented *by graphs* ~~in the graph which appears at Appendix A to this brief.~~ From *those*, ~~the graph,~~ it *shows* ~~is apparent that the~~ gap between moistureproof cellophane prices and glassine prices and between moistureproof cellophane prices and waxed paper prices sharply diminished in the period from 1929-1949. In January 1929 ~~the~~ price of moistureproof cellophane was seven times that of glassine. In June 1934 it was 4½ times ~~the~~ price of waxed paper and 3¾ times ~~the~~ price of glassine. By January 1949, moistureproof cellophane prices were only twice those of waxed paper and a little more than twice those of glassine. In 1948 and 1949 ~~the~~ gap between moistureproof cellophane and waxed paper and glassine prices was the smallest in the 20 years of moistureproof cellophane history. *Graphs show* ~~It is further apparent from the graph that~~ du Pont's productive proportion of flexible packaging materials increased as ~~the~~ gap between prices for cellophane and glassine and waxed paper narrowed. ~~The year to year changes are sometimes erratic because of differences between statistics of production and sales, but over periods of a few years or more, these cancel out, and the broad picture is unmistakable. During the 1911-1949 period, for example, the price of cellophane relative to glassine fell about 1-3, while the sales of cellophane relative to glassine and other papers rose about 600%.~~

~~It is small wonder, in the light of these facts, that Mr. R. F. Smith testified to the decline in business which would occur if the process of narrowing this relative price spread was at any time reversed and du Pont's prices raised.~~[17]

~~The actual~~ *Experience* in *markets* ~~the market place~~ further illustrates ~~the high~~ degree of price sensitivity, and ~~the~~ absence of power in du Pont to control price. By annotations to certain of its proposed findings, du Pont ~~has~~ called *my* ~~the Court's~~ attention to ~~numerous~~ specific examples of business lost or gained as a result of price. The record shows ~~that time and again~~ du Pont was unable to sell a particular account or retain the business of a particular account due to price. ~~Conversely,~~ *It disclosed* ~~discloses that~~ as prices were reduced, business became available to du Pont which it could not obtain at higher prices. The pull and tug of ~~this~~ price competition in the market was emphasized by many witnesses and shown to permeate the entire market, both geographically ~~and~~ by category and type of account. Large accounts, as well as small ~~accounts~~, responded ~~quickly~~ to price changes.[18]

There is no ~~single~~ cellophane, glassine or wax paper price, nor is there a clear-cut margin between cellophane prices and prices of other materials. There are *many* ~~over 50~~ types of du

[17] R. 301, quoted (D.Br. 99); du Pont's district court brief, pp. 45-46.

[18] R. 301, quoted (D.Br. 99-100); du Pont's district court brief, p. 46.

Pont cellophane ~~alone,~~ selling at prices from $.45 per lb. to $.85. ~~These types are distinct wrapping materials.~~ Each has properties and qualities different from other types. Each type represents a particular price-~~quality combination, or value. All these combinations are then~~ multiplied by ~~the~~ varying opinions and appraisals of ~~this~~ combination by buyers, each of whom makes an individual appraisal in the light of his specific package needs and the economics of his business.[19]

Glassine, for example, demonstrates this ~~to be true.~~ Rhinelander ~~alone~~ lists over 30 varieties of glassine, from $.235 per lb. to $.475 ($23.50 to $47.50 per cwt.). Each is different in weight, transparency (super-transparent to opaque), in form of coating or lamination, heat-sealing and moistureproof properties. ~~Again the total combinations are multiplied by individual buyer's opinions.~~[20]

~~Further~~ Variations in price occur as materials are printed, laminated, or processed into wraps designed to meet specific packaging uses. ~~What~~ This produces ~~is~~ a closely-packed range of price-quality values, with much overlapping and duplication, with ~~a~~ multiplicity of choices for each buyer who wants certain price-quality combinations. Here, ~~as elsewhere~~, du Pont is forced, as a matter of ~~normal~~ business judgment, to be bound by ~~the~~ wishes of its ~~most~~ critical customers, ~~whom~~

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[19] R. 301, quoted (D.Br. 100); du Pont's district court brief, p. 47.

[20] R. 301-2, quoted (D.Br. 100); du Pont's district court brief, p. 47.

~~any adverse change in any part of the price-quality spectrum might turn away from du Pont. There is no room in this kind of a price structure for du Pont to raise prices without bringing on significant losses of business.~~[21]

~~The extent and~~ Character of this price competition is emphasized by ~~the separate and additional~~ evidence of quality competition. It is, ~~of course,~~ recognized ~~that~~ throughout the period of cellophane development, ~~constant improvement in quality was taking place~~. ~~The~~ Evidence, ~~moreover,~~ discloses ~~that~~ these quality improvements affected du Pont's ability to sell. In instances where its quality was inferior, ~~and hence, its relative price more out of line,~~ it lost business. In instances where its quality was superior, ~~and hence its relative price more in line,~~ it gained business. The record *shows* ~~is replete with numerous~~ examples of shifts of business due to quality, ~~and these also are fully annotated against the proposed findings of fact.~~[22]

~~Reference has already been made to many facts bearing on this question.~~ ~~The~~ Willingness ~~and ability~~ of buyers to switch rapidly from one wrapping material to another has been ~~clearly~~ demonstrated. The nature of ~~the~~ products, ~~the~~ organization of ~~the~~ market, its ~~exacting~~ requirements, its ~~dynamic~~ growth, ~~the actual~~ behavior of buyers and sellers in the market, ~~the changing~~ nature of ~~the~~ buyers' de-

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[21] R. 302, quoted (D.Br. 100); du Pont's district court brief, pp. 47-48.

[22] R. 302, quoted (D.Br. 101); du Pont's district court brief, p. 48.

mands and ~~many~~ other factors all point in the direction of ~~an extreme~~ degree of price and quality sensitivity and, hence, competition to which du Pont's cellophane prices must ~~at all times~~ be responsive.[23]

[23] R. 302, quoted (D.Br. 101); du Pont's district court brief, pp. 48-49.

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